90-1745

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Section 3585(b) of Title 18 provides that a defendant shall be given credit toward the service of a term of imprisonment for any period he has spent in official detention before beginning his sentence. Credit is awarded if the detention is attributable to the offense of conviction or to any other offense for which the defendant was arrested after committing the offense of conviction, as long as the period of detention has not been credited against another sentence.

The question presented in this case is whether the computation of credit is to be made by the district court at the time of sentencing or by the Attorney General after the defendant begins to serve his federal sentence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	4
Conclusion	12
Appendix A	1a
Appendix B	9a

TABLE OF AUTHORITIES

Cases:

United States v. *Brumbaugh*, 909 F.2d 289 (7th Cir. 1990)	6, 9
United States v. *Chalker*, 915 F.2d 1254 (9th Cir. 1990)	6
United States v. *Flanagan*, 868 F.2d 1544 (11th Cir. 1989)	5
United States v. *Londono-Cardona*, 759 F. Supp. 60 (D.P.R. 1991)	6
United States v. *Lucas*, 898 F.2d 1554 (11th Cir. 1990)	3, 6
United States v. *Martinez*, 837 F.2d 861 (9th Cir. 1988)	5
United States v. *Morgan*, 425 F.2d 1388 (5th Cir. 1970)	5
United States v. *Richardson*, 901 F.2d 867 (10th Cir. 1990)	5
United States v. *Woods*, 888 F.2d 653 (10th Cir. 1989), cert. denied, 110 S. Ct. 1301 (1990)	6

Statutes:

18 U.S.C. 1951(a)	2
18 U.S.C. 3568 (1982)	3, 4, 5, 8
18 U.S.C. 3582(a)	9
18 U.S.C. 3582(c)	9

Statutes—Continued: Page

18 U.S.C. 3582(d) 9
18 U.S.C. 3583(a) 9
18 U.S.C. 3583(c)-(g) 9
18 U.S.C. 3584(b) 9
18 U.S.C. 3585 ..... 5, 9, 10
18 U.S.C. 3585(a) 8
18 U.S.C. 3585(b) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12
18 U.S.C. 3585(b)(1) 2, 7
18 U.S.C. 3585(b)(2) 2, 7

Miscellaneous:

H.R. Rep. No. 1541, 89th Cong., 2d Sess. (1966) 5
S. Rep. No. 225, 98th Cong., 2d Sess. (1984) 9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 916 F.2d 1115.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1990. A petition for rehearing was denied on February 11, 1991. App., *infra*, 9a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3585(b) of Title 18, U.S.C., provides:

> (b) Credit for prior custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

STATEMENT

1. In August 1988, respondent participated with two co-defendants in an abortive attempt to rob the Bank of Putnam County in Cookeville, Tennessee, by making threats to the chief executive officer of the bank. Respondent and his co-defendants also threatened harm to the families of four high school students in an attempt to induce the students to help them carry out the scheme. App., *infra*, 2a. Two of the students foiled the plot by reporting it to the authorities. *Ibid.*

In October 1988, respondent was arrested by state officials in connection with several other robberies. On December 15, 1988, while respondent was in state custody, he was indicted in federal court for violating the Hobbs Act, 18 U.S.C. 1951(a), based on his involvement in the Bank of Putnam County incident. He was formally arrested on that indictment on May 15, 1989, but he remained in the custody of the

Putnam County Sheriff pending disposition of the state charges against him. App., *infra*, 2a-3a.

On November 29, 1989, respondent pleaded guilty to the federal charge and was sentenced on that charge to 96 months' imprisonment. At the time of sentencing, the district court orally denied respondent's request that he be given credit against his federal sentence for the time he served in state custody prior to the time his federal sentence was imposed. App., *infra*, 3a. Approximately ten days after respondent was sentenced on the federal charge, he was sentenced on the state charges for which he had been detained. The state court awarded him full credit against his state sentence for the 429 days he had been in state custody, between October 5, 1988, and December 7, 1989. Gov't C.A. Br. Addendum C.

2. The court of appeals held that the district court should have granted respondent credit against his federal sentence for the period he had spent in state custody. The court first held that under 18 U.S.C. 3585(b), unlike its immediate predecessor, 18 U.S.C. 3568 (1982), it is the district court, not the Attorney General, that must award credit for time spent in official detention. The court acknowledged that its ruling on that point was at odds with the Eleventh Circuit's decision in *United States* v. *Lucas*, 898 F.2d 1554 (1990), in which the court held that the Attorney General has exclusive authority under Section 3585(b) to award credit against a federal sentence. App., *infra*, 6a & n.2.

The court of appeals further held that a district court must give credit for a period of state detention as long as that period of detention "has not been credited to some other sentence, state or federal, *at the time sentence is imposed*." App., *infra*, 8a. As a

consequence of that ruling, respondent in effect received double credit for the time he served in state detention, since that time was credited both to his federal sentence and to his subsequently imposed state sentence as well.

The government petitioned for rehearing with suggestion for rehearing en banc, but the petition was denied. App., *infra*, 9a.

REASONS FOR GRANTING THE PETITION

This case presents an important question on which the courts of appeals are divided. The issue affects the administration of the federal prison system and the role of federal courts at sentencing. This Court's review is needed to ensure that decisions regarding the award of credit against federal sentences for time previously served—decisions that are made thousands of times each year—are made in a uniform fashion according to the scheme Congress intended.

1. Before 1987, it was clear that computing and assigning credit to federal prisoners for presentence periods of detention was an administrative duty of the Attorney General, not a judicial function. See 18 U.S.C. 3568 (1982).[1] Under that regime, computation and credit decisions were made according to uniform, nationwide guidelines administered by the Bureau of Prisons. The computation process would

[1] Section 3568 provided as follows:

> The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense * * * which is in violation of an Act of Congress and is triable in any court established by an Act of Congress.

take place after the defendant had been sentenced and transferred to the custody of the Attorney General; although the Attorney General's decision was subject to judicial review, the sentencing court had no direct role in making the computation and award of credit. *See, e.g., United States* v. *Flanagan*, 868 F.2d 1544, 1546 (11th Cir. 1989); *United States* v. *Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *United States* v. *Morgan*, 425 F.2d 1388, 1389-1390 (5th Cir. 1970); see also H.R. Rep. No. 1541, 89th Cong., 2d Sess. 4 (1966) ("[u]pon imposition of sentence, the convicted defendant is turned over to the custody of the Attorney General and, therefore, from the administrative standpoint the Attorney General should be the individual who would give credit to the convicted defendant").

In 1984, Congress revised Section 3568, which was recodified as Section 3585(b), to state that "[a] defendant shall be given credit" toward his term of imprisonment for any period of "official detention" for which the defendant was arrested after committing the offense for which he was being sentenced.[2] Because the new statute was silent regarding who was to make the eligibility determinations, the courts have had difficulty deciding whether Congress in-

[2] The new provision, which became effective in November 1987, replaced the term "custody" with the more precise term "official detention." In addition, it authorized credit not only for time spent in custody "in connection with the offense or acts for which sentence was imposed," but also for time spent in official detention "as a result of any other charge," as long as the time spent in detention was not credited to any other sentence. Relying on this language, the Bureau of Prisons awards credit against federal sentences under Section 3585 for time spent in state detention. See *United States* v. *Richardson*, 901 F.2d 867, 870 (10th Cir. 1990).

tended the Attorney General to continue making credit computations and awards, or whether it intended to transfer that responsibility to district courts as part of the sentencing process. Resolution of that question is important not only because it affects the mechanics of sentencing and prison administration, but also because, as this case demonstrates, it can affect the question whether credit is to be awarded at all.

Pointing to the omission in Section 3585(b) of language referring to the Attorney General, the court of appeals in this case held that the new statute was meant to transfer to the sentencing court the responsibility for computing and awarding credit for presentence detention. The Ninth Circuit, in *United States* v. *Chalker*, 915 F.2d 1254 (1990), reached a similar result. Although it held that district courts and the Bureau of Prisons have concurrent responsibility under Section 3585(b) to make credit awards, the *Chalker* court acknowledged that the effect of its ruling was to assign to the district courts the principal responsibility for granting credit for time previously served. See also *United States* v. *Londono-Cardono*, 759 F. Supp. 60 (D.P.R. 1991) (Section 3585(b) reassigned task of awarding credit from Attorney General to sentencing court).

Three other circuits have reached the opposite conclusion. See *United States* v. *Brumbaugh*, 909 F.2d 289, 291 (7th Cir. 1990); *United States* v. *Lucas*, 898 F.2d 1554, 1556 (11th Cir. 1990); *United States* v. *Woods*, 888 F.2d 653, 654 (10th Cir. 1989), cert. denied, 110 S. Ct. 1301 (1990). Those courts have held that the Bureau of Prisons, as the Attorney General's designee, retains exclusive authority under Section 3585(b) to award credit for time served, and that a prisoner seeking relief from a decision denying

credit must exhaust his administrative remedies within the Bureau of Prisons before seeking judicial review of the decision.

The conflict among the circuits has resulted in an administrative nightmare for the Bureau of Prisons, which has prisoners from every judicial circuit and operates facilities in every circuit but the First. Because credit decisions in some circuits are now being made by individual sentencing judges, rather than through application of uniform national guidelines administered by the Bureau of Prisons, similarly situated prisoners in the same facility may be subject to different treatment with respect to the award of credit for time served. Moreover, with respect to defendants sentenced in circuits that have not yet addressed the issue, Bureau of Prisons officials can only guess whether the Bureau is responsible for making credit decisions or whether the Bureau must defer to the sentencing court. The current fragmented system of resolving this frequently recurring issue will continue to engender confusion, unnecessary litigation, and disparate treatment of similarly situated defendants until the issue is settled. This Court should therefore resolve the conflict among the circuits on this question.

2. The language and purposes of Section 3585(b) strongly suggest that the credit determination is not to be made by the court at sentencing, but by the Bureau of Prisons at some point after the defendant begins to serve his sentence. To begin with, Section 3585(b)(1) provides that defendants must be awarded credit for time spent in official detention as a result of the offense "for which the sentence *was* imposed" (emphasis added). Likewise, Section 3585(b)(2) mandates credit for time in detention as a result of any other charge for which the defendant

was arrested after the commission of the offense "for which the sentence *was* imposed" (emphasis added). In this respect, Section 3585(b) is identical to its predecessor, Section 3568, which also provided that credit be awarded in connection with the offense "for which sentence *was* imposed" (emphasis added). In both provisions, the use of the past tense indicates that the award of credit would be made some time after sentencing rather than contemporaneously with the imposition of sentence.

Section 3585(b) also states that credit must be awarded for time spent in official detention "prior to the date the sentence commences." Section 3585(a) makes clear that a sentence commences not on the date of sentencing, but "on the date the defendant is received in custody" or "arrives voluntarily to commence service" of the sentence at the facility at which it is to be served. As this case illustrates, the district court will often not be able to determine at sentencing how much time the defendant will have served in official detention for which he is eligible to receive credit by the time he begins to serve his federal sentence.[3] The Bureau of Prisons, by contrast, need not speculate about the amount of credit to which a defendant is entitled on the date he commences to serve his sentence. As the federal agency responsible for receiving new prisoners, the Bureau of Prisons can make that calculation when the defendant begins serving his term. Since the Bureau of Prisons, and not the district court, is in the position to carry out

[3] As respondent's state judgment and commitment order reveals, see Gov't C.A. Br. Addendum C, he remained in state custody for several days after he was sentenced on the federal charges, but before he commenced serving either his state or federal sentence. He ultimately received credit for that interim period against his state sentence.

the statutory requirement that a defendant receive credit for time served up to the date of commencement of his sentence, it makes sense to read the statute to preserve the Bureau of Prisons' traditional role in making the credit determination.

Although the court of appeals attached great weight to the omission of any reference to the Attorney General in Section 3585(b), it seems quite unlikely that Congress would have abandoned the long-standing statutory delegation of responsibility in this area to the Attorney General without doing so explicitly. Congress made the court's decisionmaking authority in other sentencing matters plain by repeatedly including the phrase "the court shall" or "the court may" in statutory provisions closely related to the one at issue here. See 18 U.S.C. 3582(a), (c) and (d) (court's authority to impose a sentence of imprisonment); 18 U.S.C. 3583(a) and (c)-(g) (court's authority to impose term of supervised release following imprisonment); 18 U.S.C. 3584(b) (court's authority to impose concurrent or consecutive sentences). If Section 3585(b) was intended to depart from prior law by assigning to sentencing courts the responsibility for awarding credit for time served, it surely would have been drafted with the specificity that is evident in those other sections.[4]

[4] The legislative history of Section 3585 is silent on the question of what entity is to award credit for time served. That silence bolsters the conclusion that the new statute did not shift responsibility for making credit awards to the sentencing court. The Senate Report summarizes the predecessor statute without alluding to the delegation of authority to the Attorney General, and the discussion of Section 3585(b) does not advert to the omission of an express delegation. See S. Rep. No. 225, 98th Cong., 2d Sess. 128-129 (1984). As the Seventh Circuit observed in *United States* v. *Brumbaugh*, 909 F.2d at 291, "[c]ertainly, if Congress had decided to make

The court of appeals' conclusion that district courts are authorized to award credit for time served under Section 3585(b) is also incompatible with the statute's explicit prohibition against "double counting" —that is, the command that a defendant not receive credit for a period of detention that is credited against another sentence. As this case illustrates, a defendant may be eligible to receive credit for the same period of detention against both his state and federal sentence. If the district court imposes sentence before the defendant is sentenced on the state charges, the court will not be in a position to predict at sentencing what the state court will do. Thus, the federal court may end up shortening the defendant's sentence to take account of the same period of detention for which he subsequently receives credit from the State—exactly what happened in this case.

That outcome is contrary to the statutory command that credit be given only for a period of detention "that has not been credited against another sentence." Section 3585 contains a flat ban on double counting, not one that is conditioned on whether credit has already been awarded when the federal sentence is imposed. Yet the court of appeals, in effect, read such a condition into the statute, because the result of assigning responsibility for the credit decision to the sentencing court is that the same period of detention counts twice whenever the state award of credit postdates the sentencing for the federal offense. Thus, the court of appeals had to rewrite Section 3585(b) in order to legitimate the double counting that is the inevitable outcome of the

---

such a significant change in the allocation of responsibility in the sentencing function, the legislative history—comprehensive on so many other areas of criminal law reform—would reflect that policy choice."

sentencing courts' administration of that Section.[5] Nothing in the statute, however, remotely supports that result, and there is no sound reason why a defendant should receive the windfall of double credit for a single period of detention simply because of a fortuity of timing.

The anomaly produced by the court of appeals' ruling can be avoided, and the double counting ban applied as written, if the award of credit is treated as an administrative task that permits adjustments after the date of sentencing. In the course of a defendant's service of his federal sentence, it will ordinarily become clear whether the defendant has been given credit on other sentences for periods of detention that fall within the scope of Section 3585(b). If the credit determination is an administrative task, rather than part of the sentencing process, adjustments can be made during the defendant's sentence to account for later awards of credit on other sentences imposed after the federal sentence. But such adjustments cannot easily be made if the credit determination is one for the sentencing court to make as part of the imposition of the federal sentence.

Thus, the double counting prohibition of Section 3585(b) necessarily contemplates a scheme with the flexibility to adjust to changing circumstances. If the court of appeals had held that the credit determination was for the Bureau of Prisons to make, the

---

[5] Significantly, the court described Section 3585(b) as mandating "full credit for the total custodial presentence detention arising from both state or federal offenses so long as that time has not been credited to some other sentence *at the time federal sentence is imposed.*" App. *infra*, 82. That paraphrase is accurate except for the last clause, which has no grounding whatever in the language of the statute.

Bureau could simply have noted the award of credit on respondent's state sentence and followed the statutory prohibition against double counting by refusing federal sentence. Instead, since the sentencing process lacks that flexibility, the court of appeals' construction of Section 3585(b) as a sentencing provision drove it to grant double credit for the detention period in spite of the express statutory prohibition against double counting. Because the court's decision conflicts with the decisions of other courts of appeals and departs sharply from the traditional and natural construction of an important statute, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

MAY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 89-6583

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD WILSON, DEFENDANT-APPELLANT

Argued July 31, 1990

Decided Oct. 23, 1990

Before KEITH and KRUPANSKY, Circuit Judges, and JORDAN, District Judge.*

KRUPANSKY, Circuit Judge.

Defendant-appellant Richard Wilson has appealed from the sentence imposed in a judgment entered by the United States District Court for the Middle District of Tennessee pursuant to a guilty plea for conspiring to obstruct, delay, or affect commerce by the robbery of money from a bank and the threat of physical violence in furtherance of that plan, in violation of 18 U.S.C. § 1951.[1]

---

* The Honorable Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1] (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or at-

Appellant organized a group of seven individuals, including himself, to commit a series of robberies involving the use of firearms provided by appellant in the Cookeville, Tennessee area. Appellant and two codefendants recruited four high school students by threatening to kill members of their families. During the month of August, 1988, appellant conspired with his codefendants to rob the Bank of Putnam County by forcing entry into the residence of Jack Ray, the chief executive officer of the bank, and, by threatening physical harm to him and/or his wife, inducing Ray to accompany the conspirators to the bank, where they would rob it of its funds. The first attempt was aborted when one of the students, Robert Jones, panicked and refused to enter the Ray residence. The second attempt failed when two of the other high school students reported the plot to authorities.

Appellant was arrested by state authorities on October 5, 1988, apparently in connection with various other robberies and remained in state custody through the date of his sentencing in the present case. Appellant was indicted December 15, 1988 on the instant federal offense. On that date, an arrest warrant was also issued which was signed and returned by the United States Marshal's Office on May 17, 1989. On December 16, 1988, a federal detainer was issued against the appellant. On May 15, 1989 and thereafter, when the appellant was required to ap-

---

tempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). Attempt and conspiracy are written into this section, and it was unnecessary to charge appellant with a separate crime of attempt or conspiracy.

pear before the federal court, the district court issued orders to the sheriff of Putnam County, Tennessee to produce the "prisoner ad prosequendum." Throughout the entire period from October 5, 1988 to appellant's sentencing in the instant case on November 29, 1989, appellant was in the custody of the Putnam County Sheriff pending disposition of various state criminal charges.

On November 29, 1989, Wilson pleaded guilty, pursuant to a plea agreement in which the government recommended that the sentence not exceed 96 months. Following a sentencing hearing, the district court fixed the offense level at 26, which included a four-level increase for being an organizer and leader of criminal activity involving five or more persons. The offense level was reduced two levels to 24 for acceptance of responsibility for the offense. The defendant's criminal history category was determined to be I, resulting in a guideline range of 51 to 63 months of incarceration. The court thereupon departed upward from the guidelines by imposing a sentence of 96 months. Appellant requested credit for time served as a result of his presentence state custody, but his request was denied by the trial court. Appellant filed a timely notice of appeal.

In support of its upward departure from the guidelines, the court concluded that appellant was the primary organizer and leader of a criminal activity which involved five or more participants, "the one with the greatest control, the ultimate decision maker"; that appellant had, by coercion and threats of physical violence against family members of four participating high school students, induced their involvement; that Wilson's criminal history category inadequately reflected the seriousness of his past criminal conduct; and that the conspiracy included

a plan to abduct or physically restrain one or more persons.

On appeal, appellant has charged that the district court erred by unreasonably departing upward from the sentencing guidelines in the imposition of sentence and in failing to grant appellant credit for the time he was in state custody from October 5, 1988 until he entered upon service of his federal sentence in the instant case pursuant to 18 U.S.C. § 3585 (b) (2).

Upon review of the record in its entirety, the briefs of the parties, and the arguments of counsel, the district court's upward departure from the guidelines is affirmed because the district court committed no factual or legal errors in the direction and degree of the departure. *See United States v. Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989).

The statute addressing credit toward the service of a term of imprisonment provides:

> A defendant *shall* be given credit toward the service of a term of imprisonment for *any* time he has spent in official detention prior to the date the sentence commences—
>
> > (2) as a result of *any* other charges for which the defendant was arrested *after* the commission of the offense for which the sentence was imposed
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b) (2) (emphasis added).

The interpretation of a statute is a question of law and is reviewed *de novo*. *Vause v. Capitol Poly Bag, Inc.*, 886 F.2d 794, 798 (6th Cir. 1989). "The objective of statutory construction is to 'ascertain the intent of Congress.'" *Vause*, 886 F.2d at 798. "The

starting point in determining legislative intent is the language of the statute itself." *Id.* (*citing Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677, 68 L.Ed.2d 80 (1981)). Only when the intent of Congress is unclear, does the court turn to legislative history. *Id.* at 801. "It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government . . . and in favor of the persons on whom penalties are sought to be imposed." 3 N. Singer, Sutherland Stat. Const. § 59.03, at 11 (4th ed. 1984) (citing, *e.g.*, *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.25 381 (1980); *United States v. Cox*, 593 F.2d 46 (6th Cir. 1979)).

Section 3585(b) (2) became effective for crimes committed on or after November 1, 1987, along with the balance of the Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 1976 (1984). Credit for presentencing custodial time served for crimes committed prior to November 1, 1987 was governed by former 18 U.S.C. § 3568 which read in pertinent part:

> The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offenses or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense . . . which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

18 U.S.C. § 3568 *repealed by* Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, § 203(a), 98 Stat. 1976, 1976 (1984). The language of the new statute is both broad and mandatory, rather than

narrow and permissive, stating that a defendant "*shall* be given credit" for "*any* time he has spent in official detention . . . as a result of *any* other charges."

Under former section 3568, the duty to credit presentencing custodial time served was delegated exclusively to the Attorney General. The language of the new statute, however, has deleted all reference to the Attorney General, reflecting a congressional intent to withdraw its theretofore delegation to the Attorney General to credit presentencing custodial time served pursuant to former 18 U.S.C. § 3568. It is also worthy of note that section 3585(b)(2) is incorporated into Chapter 227 of title 18 styled "Sentences" and is itself specifically styled "Calculation of a Term of Imprisonment," which delegates the authority to impose sentence upon the trial judge, which authority includes the duty to *calculate* and *credit* presentence custodial time in the determination of the sentence of a convicted offender at the time of sentencing.[2]

---

[2] This court finds the reasoning of the Eleventh Circuit in *United States v. Lucas*, 898 F.2d 1554 (11th Cir.1990) to be unpersuasive. First, it is unnecessary to address the legislative history where the language of the statute is clear and unambiguous. *Caminetti v. United States*, 242 U.S. 470, 486, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); *Vause*, 886 F.2d at 801. Second, the language of the statute was obviously materially changed. The court must accordingly presume that the radical departure from the language of former § 3568 reflected a congressional intent to rescind the authority of the Attorney General to credit presentencing custodial time. Finally, the Eleventh Circuit's observation that the Justice Department's failure to change its regulations subsequent to the enactment of section 3585 is of no consequence as those regulations refer to a broad delegation of the Attorney General's duties concerning prisons and prisoners and have historically refrained from addressing the issues joined by section 3585. *See* 28 C.F.R. §§ 0.96, 542.10-.16 (1989).

It is true that pursuant to former section 3568, some case law construing that old statute limited the credit of presentencing confinement to time served while in federal custody. *See, e.g., United States v. Garcia-Gutierrez*, 835 F.2d 585, 586 (5th Cir. 1988) (construing former section 3568); *United States v. Blankenship*, 733 F.2d 433, 434 (6th Cir. 1984) (same). Here again, however, the significant change in the language of newly enacted section 3585(b)(2) to read "*any* time . . . spent . . . as a result of *any other* charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed that has not been credited against another sentence" (emphasis added), discloses a congressional intent to credit both state and federal presentencing custodial time against a federal sentence.

The Tenth Circuit, in *United States v. Richardson*, 901 F.2d 867 (10th Cir. 1990), applied the plain language of section 3585 literally. In that case, the defendant was arrested by Denver police in early July, 1988 (exact date unknown) and charged with possession of cocaine. *Id.* at 870. When the possession charge was dropped on October 5, 1988, he was taken into federal custody on counterfeiting conspiracy charges. *Id.* The Tenth Circuit concluded that the district court erred in failing to credit the defendant with time served prior to October 5. *Id.* After quoting section 3585(b), the court analyzed the facts of the case and reasoned that since the counterfeiting conspiracy had occurred prior to defendant's state custody and his time had not been credited to any other sentence, the case should be remanded to the district court with instructions to credit the federally imposed sentence with the total presentencing custodial time, both state and federal, from the date he was originally taken into custody. *Id.*

This Circuit adopts the *Richardson* analysis. Applied to the facts of this case, appellant's violation of 18 U.S.C. § 1951 occurred prior to his being taken into state custody on October 5, 1988. On November 29, 1989, when the appellant was sentenced for the federal crime to which he pleaded guilty, he had not been credited with any of the time that he had served in state custody as a result of any state or federal offense.[3] Section 3585 mandates full credit for the total custodial presentence detention arising from both state or federal offenses so long as that time has not been credited to some other sentence *at the time federal sentence is imposed.*

In summary, this court concludes that a federal district court has the initial authority and duty to apply the mandate of 18 U.S.C. § 3585 at the time the court imposes sentence for a federal offense, and that credit for presentence custodial detention served includes time served as a result of a federal and/or state offense if such detention was imposed subsequent to the commission of the federal offense for which the defendant is being sentenced and as long as the time served has not been credited to any other sentence, state or federal, at the time sentence is imposed in the case immediately before the court.

Accordingly, for the reasons stated herein, the district court's judgment and sentence is AFFIRMED as to the upward departure from the guidelines. The case is REMANDED to the district court to resentence the appellant in a manner not inconsistent with the directions of this opinion.

---

[3] At the time of sentencing, the appellant and state prosecutors had only a tentative agreement for resolving the state charges pending against appellant. Transcript of Sentencing Hearing, November 29, 1989, at 43-44.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 89-6583

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD WILSON, DEFENDANT-APPELLANT

[Filed Feb. 11, 1991]

Before: KEITH and KRUPANSKY, Circuit Judges; and JORDAN, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

---

* Hon. Leon Jordan sitting by designation from the Eastern District of Tennessee

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20529